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No. 92-391

In The

Supreme Court of the United States

October Term, 1992

AMPRO FISHERIES, INC.,

Petitioners,

v.

JUDITH YASKIN, COMMISSIONER OF ENVIRONMENTAL PROTECTION; GEORGE HOWARD, DIRECTOR, DIVISION OF FISH, GAME AND WILDLIFE; and BRUCE FREEMAN, ADMINISTRATOR, MARINE FISHERIES ADMINISTRATION,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Commerce Clause of the Constitution prohibit the passage of non-discriminatory state regulations which further legitimate safety interests, the conservation of the menhaden resource, and the breeding of those fish which feed on menhaden, by prohibiting the taking of menhaden for industrial purposes within the State's near-shore waters, when the State's regulations do not pose an undue burden on out-of-state interests and are similar to those enacted by other states?

2. Is the State of New Jersey barred from regulating the taking of fish within its territorial waters in the Delaware Bay and River by reason of a 1905 Compact between New Jersey and Delaware which provided a mechanism for uniform bi-state regulation within those waters when the states have never adopted uniform laws?

3. Is a state precluded from restricting specified large commercial vessels to the 1.8 miles of its three miles of territorial waters that are furthest from its shoreline, simply because those vessels hold federal licenses, when the State's restriction furthers legitimate local safety interests and legitimate conservation interests?

4. Is a state preempted from enacting regulations intended to further boating safety, to promote conservation and to assure the availability of the menhaden fish resource to all user groups, by prohibiting the taking of menhaden for industrial purposes by purse seine within the 1.2 miles of waters closest to the State's shoreline, merely because Congress has enacted general laws governing vessel traffic?

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Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

The Respondents, Judith Yaskin, Commissioner of Environmental Protection, et al., respectfully request that this Court deny the Petition for Certiorari seeking to review the opinion of the New Jersey Supreme Court reported at 127 N.J. 602, 606 A.2d 1099 (1992).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

At issue in this case is the constitutionality of regulations of the State of New Jersey which further local safety interests as well as legitimate conservation and resource allocation interests by restricting large commercial menhaden fishing vessels and their large nets to the 1.8 miles of the State's three mile-wide territorial waters furthest from its shoreline. The petitioner, a Virginia commercial fishing company, alleged that the regulations violated the Commerce and Supremacy Clauses of the United States Constitution and were foreclosed by a 1905 interstate Compact between the States of New Jersey and Delaware which relates to the waters of the Delaware Bay and River. The New Jersey Supreme Court rejected the constitutional challenge because the regulations did not discriminate against interstate commerce, advanced the legitimate state interests of eliminating spatial conflicts between the large industrial menhaden vessels and inshore sport fishermen and enhancing the breeding grounds for game fish feeding on menhaden, and were comparable to the restrictions placed on large industrial menhaden vessels by the states of Maryland, Delaware, North Carolina, South Carolina, New Hampshire and New York.

In addition, the State Supreme Court also held that the regulations were not preempted by federal navigational laws and thus not violative of the Supremacy Clause because Congress had not expressed an intent to displace state action in the field. The State Supreme Court further concluded that the 1905 Compact between Delaware and New Jersey did not preclude unilateral regulation by New Jersey within the Delaware Bay and River, because the "condition precedent" to any claim of exclusive jurisdiction under the Compact, namely the passage of uniform laws by both States, had never occurred.

According to the New Jersey Supreme Court, the State's regulations clearly constitute "reasonable and even handed conservation measures, so essential to the preservation of our vital marine sources of food supply." Moreover, the regulations are part of a "complex regulation of fisheries resources" that is "within the primary jurisdiction of the councils established under state and federal law." (Pa 16 to Pa 18). Accordingly, the regulations are valid, and further review by this Court is unwarranted.

This case first arose in 1990, when petitioner Ampro Fisheries, Inc. (hereafter "Ampro"), a company that fishes for the menhaden fish for reduction purposes (using the fish for their oil content) by using purse seine nets, filed a lawsuit in the New Jersey courts seeking to invalidate N.J.A.C. 7:25-22.2(a)(2), a regulation of the State of New Jersey that had been adopted some seven months earlier, in July 1989. This regulation prohibits purse seine fishing for menhaden for purposes other than for bait within 1.2 miles of the New Jersey shoreline, as well as within the State's territorial waters of the Delaware, Raritan, and

Sandy Hook Bays. A second State regulation, N.J.A.C. 7:25-22.3, prohibits purse seine fishing for menhaden for bait within .6 miles of the New Jersey shoreline, within .3 miles of shore in Raritan and Sandy Hook Bays and within designated areas of Delaware Bay, and also prohibits the use of vessels exceeding 90 feet in length for such fishing and the use of nets exceeding 150 fathoms (900 feet).

N.J.A.C. 7:25-22.2 was adopted to eliminate conflicts between recreational fishermen and large menhaden boats and nets in New Jersey's crowded near-shore waters, to protect the juvenile menhaden found in those waters as well as the birds and fish which feed on them, and to make menhaden more readily available as lobster and crab bait. The regulation does not restrict the size of the vessels or nets allowed to be used for purse seining for menhaden for purposes other than for bait, even though such vessels generally measure from 70 to 200 feet in length and use very large purse seine nets that are 1,000 to 1,400 feet long and ½ mile wide (Pa 4). Historically, New Jersey has issued about 16 annual licenses for purse seining for menhaden for purposes other than for bait, and a much lesser number of licenses for purse seining for menhaden for bait.

As a participant in the menhaden reduction industry, Ampro does not compete in the marketplace with participants in the menhaden bait industry, but with the producers of soy beans and other commodities that are oil sources. Ampro and other members of its industry obtain menhaden by using spotter aircraft to locate menhaden schools and using two purse boats to lay out a purse

seine net around the school. Once the school is surrounded, the bottom of the net is closed, or "pursed," and a triangle is formed by a large menhaden vessel and the two purse boats. A large hose is then lowered into the net and is used to pump all the fish in the purse seine net onto the large menhaden vessel (Pa 4 to Pa 5). The primary fishing zone for menhaden is three miles along the coastline (Pa 15).

Before the 1.2 mile restriction on purse seining for menhaden for non-bait purposes was adopted in 1989, New Jersey had prohibited all purse seining for menhaden within .6 miles of its shoreline. This restriction was adopted as an emergency measure in 1984, in response to a serious conflict between 16 menhaden vessels not involved in the bait industry and a group of recreational boaters that occurred in 1983, in which the small recreational boats were seriously endangered by the larger menhaden boats (Pa 21). Currently, the states of North Carolina, South Carolina, New Hampshire and New York all restrict the state territorial waters within which purse seining for menhaden is allowed, while the coastal states immediately to the south of New Jersey, Maryland and Delaware, completely prohibit such purse seining within their territorial waters extending three miles off-shore (Pa 15; Pa 17).

The state Appellate Division issued its opinion in the matter in April 1991 after rejecting Ampro's request for emergent relief in May 1990. In its opinion, the court rejected Ampro's claims that the state's regulations violated the Commerce, Supremacy and Privileges and Immunities Clauses of the federal Constitution, holding on the basis of the administrative record that the state

regulations advanced legitimate state interests in a nondiscriminatory manner and affected interstate commerce only indirectly and incidentally. The Appellate Division concluded that the regulations rationally distinguished between the menhaden bait industry and the menhaden reduction industry, that federal navigational and licensing laws did not preempt the State's "reasonable and nondiscriminatory conservation and environmental protection scheme," and that the regulations were fully authorized by the state enabling statute, N.J.S.A. 23:2B-1 *et seq.* However, the Appellate Division also held that the regulations were not valid within Delaware Bay, based on the premise that a 1905 Compact between New Jersey and Delaware precluded New Jersey from unilaterally regulating fisheries within the bay (Pa 19 to Pa 24).

The New Jersey Supreme Court granted applications for review and, on June 4, 1992, held that the State's menhaden regulations were valid in their entirety, thereby reversing the Appellate Division's ruling respecting the 1905 interstate Compact and the validity of the regulations within Delaware Bay. In affirming the validity of the regulations, the State Supreme Court held first that the 1905 interstate Compact does not currently *require* joint regulation by New Jersey and Delaware within Delaware Bay, because the Compact provided that each State would retain its right to regulate the fisheries within its territorial waters in the Bay and River until such time as both states adopted uniform laws, and New Jersey and Delaware never adopted such laws. The Court also held that on the basis of the record the regulations did not violate the Commerce Clause of the federal Constitution since they were not discriminatory and furthered the

legitimate State purposes of lessening conflicts between fishermen and enhancing the availability of menhaden as food for game fish such as bluefish, striped bass, and weakfish.

The New Jersey Supreme Court further held that the State's regulations were not preempted under the Supremacy Clause of the Federal Constitution because Congress had not "expressed its intent to displace state action in this field," and that the regulatory action at issue was also fully authorized by state law (Pa 16). In its opinion, the court observed that "maintaining the balance between the rights of those who pursue the fish and the preservation of the fish has been primarily delegated [by Congress] to the Marine Fisheries Council," and further observed that "[t]he Atlantic States Marine Fisheries Council should be empowered to resolve any undue interference by one of the States with the common resource." (Pa 17 to Pa 18).

The federal district court for the District of Delaware agreed with the decision by the New Jersey Supreme Court and denied a request for emergent relief made by the Delaware Bay Watermen's Association, Inc. and by individual commercial fishermen on June 19, 1992. In that proceeding, the plaintiffs sought to enjoin enforcement of a Delaware regulation intended to promote the conservation of weakfish, by arguing, among other things, that the regulation violated the 1905 Compact between New Jersey and Delaware. However, the Delaware federal district court rejected plaintiff's claim that the regulation violated the Compact, and concurred with the New Jersey Supreme Court that the Compact does not now preclude separate regulation by Delaware and New Jersey within

Delaware Bay because the uniform regulatory scheme the Compact authorized was never implemented. Memorandum Opinion, *Delaware Watermen's Assoc. v. Clark*, No. 92-318-SLR (June 19, 1992) (Pa 25 to Pa 43).*

New Jersey's regulations at issue in this matter were promulgated pursuant to the State's Marine Fisheries Management and Commercial Fisheries Act, N.J.S.A. 23:2B-1 *et seq.* (hereafter "the State Act"), which had been enacted to aid reciprocal relationships between New Jersey and other States, New Jersey and the Federal Government, and New Jersey and the fisheries management councils established under the Federal Fisheries Conservation and Management Act of 1976, 16 U.S.C. §§ 1801 to 1882 (hereafter "the Federal Act"). N.J.S.A. 23:2B-2(b)4. The State Act directs the Commissioner of Environmental Protection to prepare fisheries management plans for each major fishery in the State, which are to be coordinated with and take into consideration the appropriate federal, federal-state, regional management council and interstate programs. N.J.S.A. 23:2B-6. In addition, the State Act also directs the Commissioner to cooperate with other state agencies, the Federal Government and the regional fisheries management councils established under the Federal Act in managing those fisheries resources common to New Jersey and to other States. N.J.S.A. 23:2B-8.

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* In 1984, the Delaware Superior Court also held that the Compact does not now preclude unilateral regulation by either New Jersey or Delaware. *State v. Mick*, No. 83-05-0092-93 (May 2, 1984).

Under the Federal Act, New Jersey is part of the Mid-Atlantic Fishery Management Council, along with the States of New York, Delaware, Pennsylvania, Maryland and Virginia. 16 U.S.C. § 1852(a)(2). This council, like the other seven Regional Fishery Management Councils established by the Federal Act, is authorized to prepare for submission to the Secretary of Commerce a fishery management plan for any fishery within its geographical area. 16 U.S.C. § 1852(h)(1). Under the Federal Act, the Secretary of Commerce can disapprove such a regional fishery management plan, 16 U.S.C. § 1854(b)(2), and may also prepare a fishery management plan himself if appropriate. 16 U.S.C. § 1854(c). However, the Federal Act does not affect the jurisdiction or authority of any state over fisheries within the state's territorial waters unless and until the Secretary finds that the state has taken action "the results of which will substantially and adversely affect" the implementation of a fishery management plan enacted under the Federal Act. 16 U.S.C. § 1856(b).

Neither the Mid-Atlantic Fishery Management Council nor the Secretary of Commerce has to date adopted a regional or national management plan for the menhaden fishery. Accordingly, that fishery is now subject to the management of each of the coastal states, and, along with New Jersey, the states of New York, New Hampshire, Delaware, Maryland, North Carolina and South Carolina all restrict the geographic areas within which purse seining for menhaden may occur.

In affirming the validity of New Jersey's menhaden regulations, the State Supreme Court observed that complex fisheries regulation such as regulation of the

menhaden fishery should normally fall within the primary jurisdiction of the councils established under state and federal laws, and that the Atlantic States Marine Fisheries Commission should be empowered to resolve "any undue interference by one of the States with the common resource." (Pa 17). However, Ampro has never sought to formally resolve its concerns by challenging any action or inaction by that body. For this reason, and because the decision below is fully consistent with all of the relevant previous decisions of this Court, does not conflict in any way with any decision of the Court of Appeals or of any other state court, and is fact-dependent, Ampro's petition for a writ of certiorari should be denied.

ARGUMENT

Because the New Jersey Supreme Court correctly applied precedents of this Court in finding that the State's menhaden regulations did not violate the Commerce or Supremacy Clauses of the Federal Constitution, and correctly construed the 1905 Compact between New Jersey and Delaware in upholding New Jersey's right to regulate fisheries within its territorial waters of the Delaware Bay and River, and because the decision below does not conflict with any decision by the Court of Appeals or by any other state court, further review by this Court is unwarranted.

At issue in this case is whether a non-discriminatory regulation which prohibits the taking of the menhaden fish for purposes other than for bait within 1.2 miles of New Jersey's shoreline, and which was enacted to further

safety, conservation, and resource allocation interests, imposes an undue burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution. Also raised is whether a 1905 Compact between New Jersey and Delaware now makes any unilateral regulation by either State of fisheries within the Delaware Bay and River invalid, even though during the past 87 years uniform, bi-state laws authorized by the Compact have never been passed. In addition, Ampro raises as an issue the question of whether New Jersey's regulation is preempted by federal navigational and licensing laws and thus invalid under the Supremacy Clause.

No review of any of these issues by this Court is warranted, because in concluding that New Jersey's menhaden regulations did not violate the Commerce Clause and in summarily rejecting Ampro's preemption arguments, the New Jersey Supreme Court did no more than to correctly apply this Court's previous decisions to the facts. The holding of the New Jersey Court is not in conflict with any decision of a Court of Appeals or of any other state court. In addition, the State Supreme Court's ruling that the 1905 Compact between New Jersey and Delaware does not preclude unilateral fisheries regulation by either State within the Delaware Bay and River is completely consistent with a previous decision rendered by a Delaware trial court, has been appropriately followed by the federal district court of the District of Delaware in an interlocutory decision, and correctly construes the straightforward provisions of that Compact. Accordingly, Ampro's petition for a writ of certiorari should be denied. Sup.Ct. Rule 10.

A. The Commerce Clause

Review by this Court to address the New Jersey Supreme Court decision rejecting Ampro's Commerce Clause claims is unwarranted in any respect. This Court has previously held that non-discriminatory state statutes that burden interstate commerce only incidentally do not violate the Commerce Clause unless the burdens imposed on interstate trade are "clearly excessive in relation to the putative local benefits." On the other hand, a state law which regulates interstate commerce directly or discriminates against it on its face or in practical effect must serve a legitimate local purpose that could not be served as well by available non-discriminatory means. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Maine v. Taylor*, 477 U.S. 131, 137 (1986); *Wyoming v. Oklahoma*, ___ U.S. ___, 112 S.Ct. 789, 801 (1992). The New Jersey courts correctly applied these precedents to the facts in determining that New Jersey's menhaden regulations were valid.

The state courts properly concluded on the basis of the record that New Jersey's menhaden regulations were non-discriminatory on their face because they did not distinguish between residents and non-residents and rationally distinguished between the menhaden bait industry and the menhaden reduction industry in which Ampro is engaged. The courts also correctly determined that the administrative record contained no evidence of a discriminatory motive by the promulgators of the regulation and that, as a factual matter, the practical effect of the regulations on interstate commerce was merely incidental. In addition, the state courts rightly found on the basis of the record that the regulations furthered a

number of legitimate state interests, including the enhancement of the breeding grounds for fish which feed on menhaden, the lessening of social and spatial conflict between fishermen, small recreational boats and larger menhaden reduction vessels and purse seines, and conservation of the menhaden fish.

The regulations at issue make absolutely no distinction between residents and non-residents, and therefore on their face are completely neutral and non-discriminatory. Thus, because this Court has repeatedly recognized that state regulations do not discriminate against interstate commerce simply by imposing burdens on all similarly situated persons, even if most of those persons are non-residents, Ampro's claims that the regulations violate the Commerce Clause are erroneous. *See CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 89 (1987); *Exxon Corp. v. Maryland*, 437 U.S. 117, 125-26 (1978); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471 (1980). *See also Alamo Rent-a-Car v. Sarasota Manatee Airport Auth.*, 906 F. 2d 516, 522 (9th Cir. 1990).

Moreover, the fact that the regulations distinguish between taking menhaden for bait and taking it for other purposes also does not place Ampro or other non-residents at a competitive disadvantage in relation to in-state interests, and thus does not violate the Commerce Clause. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Ampro does not compete against the bait industry in the marketplace, but against other menhaden reduction companies and against the producers of soy beans and other commodities used as oil sources. In addition, and most significantly, Ampro cites no evidence that the regulations it is challenging favor

any such in-state competitors. *Cf. Exxon Corp., supra; Clover Leaf Creamery, supra.*

Additionally, Ampro's assertions that the state regulations effectively increase access to the resource by the bait industry and deny access by the reduction industry are not only irrelevant for Commerce Clause analysis, but are erroneous and were correctly rejected by the state courts. Ampro bases its claims on the fact that the regulations preclude taking menhaden for bait within .6 miles of shore, but prohibit taking menhaden for other purposes within 1.2 miles of shore. However, Ampro ignores the evidence in the record that the vessels currently allowed to take menhaden for bait are fewer in number than the menhaden reduction vessels allowed to fish from 1.2 miles of shore, and that the menhaden bait industry is prohibited by the State's regulations from using the extremely large vessels and purse seine nets which the menhaden reduction industry remains able to use. Second, as is also clear from the record, the primary migratory zone of menhaden is not within 1.2 miles of shore, but within 3 miles of shore (Pa 15; Pa 20 to Pa 22).

Last, Ampro also ignores the evidence in the record that before passage of the regulations, lobster and crab fishermen at times experienced shortages in the availability of menhaden as bait (Pa 22). These shortages demonstrate that there are legitimate reasons for the State to distinguish between the menhaden bait industry and the menhaden reduction industry.

Similarly, Ampro's claims that the regulations have a discriminatory purpose are also without merit and were correctly rejected by the courts below on the basis of the

record. The administrative history of the regulation clearly shows that the regulation was passed to further the legitimate goals of reducing spatial and social conflicts between fishermen, protecting juvenile menhaden, enhancing the breeding grounds of species feeding on menhaden, and making menhaden more readily available as lobster and crab bait. Moreover, the State Division of Fish, Game and Wildlife, the agency that promulgated the regulations, has at no time displayed a discriminatory attitude towards out-of-state interests (Pa 13). As this Court has previously held, the objectives articulated by an administrative body should be assumed to be the actual purposes of a regulation. *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 n.16 (1975); *Minnesota v. Clover Leaf Creamery, supra*, 449 U.S. at 463 n.7, 471 n.15.

Based on these facts, the courts below correctly concluded that New Jersey's menhaden regulations imposed only an incidental burden on interstate commerce, and that this burden was not "clearly excessive in relation to the putative local benefits." As is clearly evident from the record, the regulations lessen local spatial and social conflicts between fishermen and between the large menhaden reduction vessels and nets and small recreational craft, help conserve the menhaden fish by protecting the juvenile menhaden which are found closer to shore, enhance the breeding grounds of the birds and fish which feed on menhaden, and increase the availability of menhaden as lobster and crab bait. Moreover, because the primary fishing zone for menhaden is three miles wide and other coastal states impose similar or more stringent restrictions on Ampro, the regulations do not impose any

type of undue burden on Ampro or other members of its industry.

This Court should not review the factual conclusions of the courts below relating to this issue or the record upon which they were based, which is what Ampro is effectively asking it to do. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984). Similarly, there is no need whatsoever for this Court to review the legal standards that were applied to those facts because the legal standards are well settled and were applied in a manner completely consistent with this Court's previous decisions, the decisions of the Court of Appeals, and the decisions of other state courts. Thus, Ampro's petition for a writ of certiorari should be denied.

B. The 1905 Compact

The New Jersey Supreme Court also did not err in concluding that the 1905 Compact between New Jersey and Delaware does not now render invalid unilateral fisheries regulation by either New Jersey or Delaware within the Delaware Bay and River. The Compact provides in pertinent part:

> Article IV. Immediately upon the execution hereof the Legislature of the State of New Jersey shall appoint three commissioners to confer with three commissioners to be immediately appointed by the general assembly of the State of Delaware for the purpose of drafting uniform laws to regulate the catching and taking of fish in the Delaware River and Bay between said two states, which said commissioners for each state respectively shall, within two years from the

> date of their appointment report to the Legislature of each of said states the proposed laws so framed and recommended by said joint commission. *Upon the adoption and passage of said laws so recommended by the respective Legislatures of said two states,* said laws shall constitute the sole laws for the regulation of the taking and catching of fish in the said river and bay between said states. . . . [N.J.S.A. 52:28-38] (Emphasis added).

The Compact further provides:

> Article V. All laws of said states relating to the regulation of fisheries in the Delaware River not inconsistent with the right of common fishery herein above mentioned shall continue in force in said respective states until the enactment of said concurrent legislation is herein provided. [N.J.S.A. 52:28-39].

The New Jersey Supreme Court correctly concluded, as had previously been concluded by the Delaware Superior Court, that the 1905 Compact contains as a condition precedent to any claim of exclusive jurisdiction under it the requirement that commissioners of both New Jersey and Delaware agree to joint regulation, and that the Legislatures of both New Jersey and Delaware then pass the joint laws recommended by those commissioners (Pa 9). However, while New Jersey adopted such laws in 1907, L. 1907, c. 131, Delaware did not, leaving to each State its preexisting jurisdiction over its territorial waters within the Delaware Bay and River. *See Nicoulin v. O'Brien,* 248 U.S. 113 (1918) (holding that the "mere establishment of concurrent jurisdiction" by the Virginia Compact did not

limit Kentucky's power to unilaterally regulate fishing within its boundaries).

Review by this Court of the New Jersey Supreme Court's construction of the 1905 Compact is completely unnecessary. Most importantly, the State Court's construction is in absolute accord with the Compact's plain meaning, as demonstrated by the Compact language quoted above. In addition, the State Supreme Court's interpretation is consistent with the interpretation given to the Compact by a Delaware trial court in 1984. *See State v. Mick*, No. 83-05-0092-93 (Del. Super. Ct. May 2, 1984). Moreover, the State Court's decision has now been followed on an interlocutory basis by the federal district court for the District of Delaware, which on June 19, 1992 denied an application for a temporary restraining order in which it was alleged that Delaware's weakfish rules violated the 1905 Compact because they were not identical to New Jersey's weakfish rules. Memorandum Opinion, *Delaware Watermen's Association, Inc. v. Clark*, No. 92-318-SLR (June 19, 1992) (Pa 25 to Pa 43). Thus, the decision below is in full accord with the decisions of other state and federal courts on this issue.

C. The Supremacy Clause

Finally, the courts below correctly rejected Ampro's claims that New Jersey's regulations were preempted by federal navigational and licensing laws. As this Court has previously held, a state law is not preempted by federal law and does not violate the Supremacy Clause of the

Federal Constitution unless Congress has expressly provided for preemption or has done so implicitly by manifestly evidencing an intent to occupy an entire field and to thereby prohibit any state regulation within the field. Moreover, in the absence of an express congressional intent to preempt State law, it is assumed that preemption should not occur unless the State law actually conflicts with federal law or stands as an obstacle to Congress' objectives in passing the law. *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608, 2617 (1992); *Pacific Gas & Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190, 203-204 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). The New Jersey Supreme Court correctly concluded that New Jersey was not prevented from adopting the menhaden regulations at issue pursuant to these standards.

The general federal navigational laws cited by Ampro as allegedly preempting New Jersey's menhaden regulations generally regulate which vessel has the right of way when two vessels are using the same waters. However, in passing the navigational laws Congress expressed absolutely no intent whatsoever to eliminate the long-recognized right of any State to manage the fisheries within its territorial waters by regulating when, where and how specific types of fish could be taken from State waters, which is what New Jersey's menhaden rules accomplish. *See Glenovich v. Noerenberg*, 346 F. Supp. 1286, 1292-93 (D. Alaska), aff'd 409 U.S. 1070 (1972). Moreover, in passing general "rules of the road" for vessels, Congress never intended to preclude a crowded state such as New Jersey from managing its fisheries resources so as to lessen conflicts between fishermen in its crowded near

shore waters, a primary reason the State's regulations were passed. *Cf. Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

Furthermore, other federal legislation evidences Congress' firm and continuing intent to allow each State to regulate the taking of fish in State waters, as is being done in this case. Thus, 16 U.S.C. §1856, a provision of the Federal Fisheries Conservation and Management Act of 1976, specifically provides that the Act "shall not be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries," unless the Secretary of Commerce determines after hearing that the State action will adversely affect a fishery management plan adopted under the Act. 16 U.S.C. §1856. Likewise, 16 U.S.C. §3372, a provision of the federal Lacey Act, expressly provides criminal and civil sanctions for any person who imports, exports, transports, sells, receives, acquires or purchases in interstate commerce any fish taken in violation of any State law or regulation. *See also* 16 U.S.C. §3378(a) ("Nothing in this chapter shall be constructed to prevent the several States or Indian tribes from making or enforcing laws or regulations not inconsistent with the provisions of this chapter.").

Based on these Congressional Acts, on the very general nature of the federal "rules of the road," and on the total lack of evidence of any Congressional intent that the "rules of the road" displace traditional State regulation in the area of fisheries management or displace a State's long-recognized ability to respond to local safety concerns within State waters, Ampro's argument that New Jersey's regulations are preempted by federal navigational rules are frivolous at best and were correctly

rejected by the courts below. The State rules in no way conflict with the federal navigational rules or stand as any sort of obstacle to Congress' intent in passing the federal navigational rules, because they do not alter the general navigational standards contained in the federal "rules of the road" for vessels using the same waters at the same time. In addition, New Jersey's rules promote boating safety, and are thus absolutely consistent with Congress' intent in passing the federal navigational rules.

Likewise, Ampro's claims that New Jersey's menhaden regulations are preempted by the federal law relating to federal licensure of vessels, 16 U.S.C. §§12101 to 12112, are also completely baseless. The fact that Ampro's vessels are federally licensed does not render them immune from State laws regulating when, where and how fish may be taken from State waters, because Congress has evidenced absolutely no intention of any kind to prevent long-standing State regulation in that area and has instead expressly recognized the continuing jurisdiction and authority of a State over local fisheries management. 16 U.S.C. §1856; 16 U.S.C. §3372.

In addition, New Jersey's menhaden regulations do not conflict with the federal licensing law insofar as Ampro is concerned, because the State's rules do not regulate in any way the type of vessel or the type of fishing equipment Ampro may use to fish for menhaden. Rather, they simply limit the geographical area within which Ampro may take the fish by purse seine to the 1.8 miles of the three-mile wide State waters that are furthest from shore. Moreover, New Jersey has not denied a State license to any of Ampro's federally licensed vessels, but has simply restricted their operations to the 1.8 miles of

the State's territorial waters furthest from its shore, in light of the crowded nature of the State's near-shore waters and the history of conflicts between fishermen in those waters.

In claiming that New Jersey's regulations are pre-empted by federal navigational laws, Ampro states that the regulatory history and opinions of the New Jersey Supreme Court and Appellate Division show that the purpose of the State's regulations was solely to prevent spatial conflict between recreational and commercial vessels (Pb 8). However, this claim mischaracterizes the decisions below because the New Jersey Supreme Court expressly recognized that the regulations were also passed to enhance the breeding grounds of the bluefish, striped bass and weakfish that feed on menhaden, and described them as "reasonable and even handed conservation measures." (Pa 15 to Pa 16).

Likewise, the opinion of the Appellate Division noted that the conflicts between recreational and commercial fishermen included social as well as spatial tensions and that in addition to reducing those tensions, the regulations were also designed to provide additional protection for the juvenile menhaden found closer to shore, to enable predatory fish and birds to feed more easily closer to shore, and to enhance the availability of menhaden as lobster and crab bait (Pa 21 to Pa 22). The New Jersey Supreme Court affirmed these findings. Thus, the State courts expressly found on the basis of the record that New Jersey's regulations furthered a number of legitimate state interests and that, unlike the federal "rules of the road," they were not simply intended to prevent collisions at sea.

Based on these facts and standards, further review by this court is unnecessary, and Ampro's petition for a writ of certiorari should be denied. The regulations at issue fully meet all pertinent constitutional standards, and those standards were properly identified and applied by the courts below in a manner that is not in conflict with other decisions of federal or state courts. Moreover, this Court should not review the factual conclusions reached below or the facts on which they were based, despite Ampro's invitation that it do so.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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